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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 373

WALTER H. DUISBERG,
Petitioner and Appellant below,

v.

JAMES E. MARKHAM, as Alien Property Custodian,
Respondent and Appellee below.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT

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Correction

The "Jurisdictional Statement," at page 5 of the petition herein, by typographical error, gives the date of the Circuit Court's affirmance as May 25, 1944, whereas it actually was May 25, 1945 (R. 74).

Questions Presented

The respondent's brief, submitted as an answering brief, is not in fact such. It does not in any respect attempt to answer the questions presented by petitioner as reasons for the allowance of a writ.

Respondent completely ignores the questions presented by petitioner and undertakes to state his own questions and then answer them to his own satisfaction. Such action on the part of a respondent is strong indication that there *is* no answer to petitioner's contentions.

The questions which petitioner presented (petition, p. 6) as justifying the issuance of a writ may be summarized as follows:

1. Whether the denial of petitioner's motion under Rule 41(a)(2) was improper;
2. Whether the granting of respondent's motion under Rule 41(b) was improper; and
3. Whether Judge Smith's anticipatory order dismissing the complaint was improper.

Although petitioner believes that the action of the District Court in denying a continuance was improper, petitioner expressly refrained from presenting any question concerning the propriety of that action as a reason for the allowance of a writ. This was made so clear in the petition and in the supporting brief that it could not have been misunderstood.

At page 7 of his petition, petitioner specifically stated:

> "*Petitioner does not advance error in that respect [the denial of a continuance] as a reason for this application for a writ of certiorari.*"

And again, at page 10 of his brief, petitioner specifically stated:

> "*But petitioner does not advance error in that respect [the denial of a continuance] as a reason for this application for a writ of certiorari.*"

In applying for a writ, petitioner recognized that this Court does not ordinarily grant certiorari merely to re-

view the propriety of a District Court's action in denying a continuance. He therefore deliberately and unmistakably refrained from arguing the "continuance question," and predicated his petition squarely upon the question of the propriety of the District Court's action with respect to the motions made under Rules 41(a)(2) and 41(b).

Although petitioner specifically and repeatedly stated that he was not advancing error with respect to the "continuance question" as a reason for his application for a writ, respondent (p. 2) informs this Court that the questions presented are:

> "(1) Whether the district court abused its discretion in denying the petitioner a continuance from June 21, 1944, the date set for trial after prior delays, until the Fall Term which commenced in November.
>
> "(2) Whether the district abused its discretion in dismissing the complaint with prejudice when the petitioner refused to proceed to trial after his application for a continuance was denied."

Both of the foregoing questions present the denial of a continuance as the fundamental error, whereas none of the three questions presented by petitioner as reasons for the allowance of a writ rested in any sense upon the propriety or impropriety of the District Court's action in denying a continuance.

Petitioner, of course, realizes that if the questions presented by him do not properly arise from the facts in the case or if the determination of the questions presented by him necessarily depends upon the prior determination of a primary question which he fails to mention, it would be quite proper for respondent to call such matters to this Court's attention and to indicate a proper rephrasing of the "Questions Presented." That situation does not exist here.

Respondent has arbitrarily *scrapped* the three questions presented by petitioner—although they properly

arise from the facts in the case and although no prior decision upon any primary question is required for their determination—and has *substituted* two questions of his own, the first of which could be answered in the negative without in the slightest degree affecting an affirmative answer to the three questions presented by petitioner, and the second of which does not properly arise from the facts in the case, since it ignores the making of plaintiff's motion for a voluntary dismissal under Rule 41(a)(2) and since it ignores the question of whether any non-obviatable prejudice has been shown.

In short, no issue has been joined by the submission of respondent's brief.

Although, as indicated above, the first question propounded by respondent could be answered in the negative without militating in any way against the granting of a writ, *petitioner has no desire to run away from the "continuance question."* As petitioner stated at pages 6-7 of his petition and at page 10 of his brief, he believes that the District Court committed a grave abuse of judicial discretion in denying the application for a continuance, and he has asked that, *if* this Court *does* grant certiorari, he be permitted to present to this Court the propriety of the District Court's action on the "continuance question."

The petition summarizes the salient aspects of the proceedings in the District Court, from which it appears that between the day when issue was joined by the filing of defendant's specifications (in lieu of an amended answer), and the day when the complaint was dismissed with prejudice, only twelve days elapsed, including two Sundays. Of those ten working days, theoretically available to plaintiff for preparation for trial, eight days were consumed in defendant's examination before trial of one of plaintiff's principal witnesses and in defendant's discovery and inspection, at the offices of plaintiff's counsel, of a 24-foot pile of documents (R. 23a-25a, 49a-51a, 58, 62, 68-70).

Respondent, without contradicting any of the foregoing facts, or of the many other facts recited in the petition, contents himself with the remark that petitioner "was given *a most generous* opportunity" to prepare for trial. Respondent's concept of "generosity" is erroneous.

Respondent's attorney conceded that the facts constituting the proof of the issues in this case "are extremely complex" (R. 84a). The complexity of the case was such as to require respondent to expend three months in the preparation of its motion and amended motion to dismiss the complaint and the District Court to expend seven months in the consideration and decision of that motion—a total of ten months (R. 1a-2a). Respondent conceded that the case involved "the most important properties * * * monetarily" which the Alien Property Custodian had taken over in the war (R. 80a). It was conceded that the trial would last between three weeks (defendant's estimate, R. 36) and seven weeks (plaintiff's estimate, R. 69a-70a). The importance of the case and the anticipated length of the trial were such as to require the assignment of a judge from Michigan for the special purpose of hearing this single case (R. 83a-84a, 22-24, 35-36).

In such a case, a net of two working days within which to prepare for trial is *not* "most generous." It *was* a grave abuse of judicial discretion for the District Court to deny a continuance under the circumstances above stated. But since it is not the ordinary practice of this Court to grant certiorari for an abuse of discretion with respect to the denial of a continuance, petitioner did not present to this Court a question as to that abuse of discretion.

Since this Court may ultimately, upon a review of the judgment herein after granting certiorari, take cognizance of the "continuance question," it should be noted that respondent's statement of that question is unfair. Respondent (p. 2) refers to an application for "a continuance from June 21, 1944, the date set for trial *after prior delays.*" The *only* date previously set for the trial had been *June 19, 1944,*

which had been set on respondent's *ex parte* application (R. 3a, 108a). The so-called "prior delays" can refer only to that delay of two days. But even that delay is not chargeable to petitioner. Without any application therefor by petitioner (R. 35), the Court, of its own initiative, called the attorneys for both parties before it (R. 35), and entered an order changing the trial date to June 21, 1944, peremptorily against petitioner (R. 3a, 14a-15a, 45).

Respondent's "Questions" were manifestly inserted for the sole reason that they are questions which respondent thinks he can answer, and because respondent recognizes his inability to answer those presented by petitioner.

The first question presented by petitioner is whether the District Court improperly denied petitioner's motion, made prior to the commencement of trial, for a voluntary dismissal under Rule 41(a)(2). Respondent ignores that question completely. In his "Argument" respondent similarly completely ignores Point I of petitioner's brief and the thirteen cases there cited.

Respondent wishes this Court to believe that the question is whether it was an abuse of discretion to dismiss the complaint with prejudice "when the petitioner refused to proceed to trial." If the District Court had granted petitioner's motion under Rule 41(a)(2)—as it should have done, there having been no non-obviatable prejudice—the situation of petitioner "refusing to proceed to trial" could never have arisen. Respondent's effort to make it appear that the latter question is the one presented to this Court is placing the cart before the horse.

Respondent's "Questions" cannot be justified as a paraphrase of the second question presented by petitioner, because respondent's "Questions" do not embrace the distinction drawn by petitioner between a situation where there is non-obviatable prejudice and a situation where the prejudice is obviatable.

Respondent completely ignores the third question presented by petitioner, which disputes the propriety of Judge Smith's anticipatory order dismissing the complaint.

Respondent has chosen to argue questions not presented as reasons for the allowance of a writ, and to ignore those which have been presented.

Respondent's brief could not have been farther afield from the issues herein if it had been a brief written in another case. In fact, the footnote at the base of page 2 of respondent's brief appears to have been lifted bodily from a brief filed by the government in some other case, since it refers to matter "designated by the petitioner herein as 'Record Part I,'" and matter "designated by the petitioner herein as 'Record Part II,'"—record references which do not appear anywhere in the papers filed by petitioner.

Statement of the Matter Involved

Respondent's "Statement" (pp. 2-5) contains many inaccuracies. Since the entire "Statement" was manifestly written with an eye to its effect in connection with respondent's "Questions," most of those inaccuracies cease to be significant upon an understanding of the questions actually presented.

Some of respondent's inaccurate statements, however, cannot be ignored. One of these is the statement at page 3 of his brief, as follows:

> "On that day [April 4, 1944] the petitioner's counsel had the case marked 'Ready, not before May 15, 1944' (R. 1a, 89a)."

That statement is untrue. The references to the record do not support it. The truth is that the case was so marked, *not by petitioner's counsel, but by respondent's counsel.* Unfortunately, the record does not show who did so mark it.

Respondent's "Statement" (p. 5) also seeks to convey the impression that petitioner insisted upon a continuance of 140 days and refused to take anything less. The record reference given by respondent establishes that his attorney, as well as petitioner's, understood that petitioner's request was "that this case be put over until some time after Labor Day" (R. 34; 27a). In other words, the continuance requested was for 70 days, and not for 140 days. But even if petitioner *had* sought a continuance of 140 days, it is a decidedly strange argument that a party who has sought too long a continuance should, for that reason, be denied any, even though he is clearly and justly entitled to some.

Respondent's "Statement" (p. 5) further attempts to pollute the waters by asserting that petitioner "rejected the suggestion that the trial be commenced and *an adjournment be taken* in the course of the trial if the need for additional time for preparation should be established (R. 33)."

Examination of the record page cited by respondent will show that the Court made no such offer and that petitioner rejected no such suggestion. The Court's suggestion *actually* was that the case proceed on June 19, 1944, and that the Judge then "take a recess for some days." In view of the fact that Judge Lederle was brought on from Michigan to try this one case, such statement could not have meant, and was not understood to mean, that any recess for an extended period would be granted. At most it meant, and was understood to mean, a recess for two or three days. A recess of two or three days during the course of trial would not have had any appreciable effect upon petitioner's ability to prepare a million-dollar seven-weeks case for trial, and the offer of such recess did not alter the fact that petitioner was the subject of an attempt to force him to trial without adequate opportunity to prepare therefor.

Argument

Respondent opens his argument by stating (p. 5): "Turning on *the peculiarities of its facts,* this case raises no question of general importance." Had the issue presented to this Court been—as respondent apparently wishes to believe it is—the question of whether the District Court properly denied a continuance, then it might well have been said that the decision of the case rested on its own particular facts and raised no question of general importance.

But the question presented on this application for a writ *is not* whether a continuance was properly or improperly denied. The question presented on this application for a writ *is* whether it is an abuse of judicial discretion, and whether it constitutes a denial of due process of law as guaranteed by the Constitution of the United States, to dismiss an action with prejudice, before the commencement of trial, where plaintiff moves for a voluntary dismissal under Rule 41(a)(2) and no non-obviatable prejudice is shown.

That question does not arise out of the "peculiarities" of the facts of this particular case. It has arisen many times in other cases and—as was indicated in Point I of petitioner's main brief herein—prior to the decision in the instant case, it had been uniformly held by the District Courts that the correct interpretation of Rule 41(a)(2) *requires* the granting of plaintiff's motion for a voluntary dismissal under such circumstances. The proper interpretation of a rule promulgated by this Court clearly *does* present a question of general importance, more particularly where a District Court has departed from the correct principle of interpretation theretofore uniformly followed by the other District Courts.

Respondent's brief cites eight cases, none of which stands for the proposition for which it is cited.

Respondent (p. 6) cites *United States* v. *Pacific Fruit & Produce Co.*, 138 F. 2d 367 (C. C. A. 9th, 1943). The opinion in that case reveals that the suit had actually proceeded to trial, and that plaintiff therein had proffered all the testimony available to it—in fact, all the testimony which it had, prior to the trial, contemplated introducing. When plaintiff discovered that its testimony was inadequate to satisfy the court, and, as the opinion states, "apparently realizing that the appellant's case was about to collapse," plaintiff moved for a dismissal without prejudice.

Even under those circumstances, and even though defendant had been put to "tremendous expense" in the preparation of its case, the court did not instantly dismiss with prejudice. Instead, the court granted plaintiff's motion to dismiss without prejudice, upon condition that plaintiff pay defendant $250 within 45 days, to reimburse defendant, in part, for its expense in preparing for trial. More than two months later, plaintiff not having paid the $250, the court entered an order dismissing the suit with prejudice.

The affirmance by the Circuit Court of Appeals, therefore, is authority only for the proposition that a plaintiff will not be granted the privilege of discontinuing without prejudice and without terms in the midst of trial. No such privilege was sought in the instant case.

Gilbert v. *Lachapelle*, 127 F. 2d 750 (Ct. App., D. C. 1942), cited by respondent (pp. 6, 7), is completely irrelevant to the question as to whether the motion in the instant case, made under Rule 41(a)(2), should or should not have been granted.

In the *Gilbert* case, plaintiff made no motion for a voluntary dismissal under Rule 41(a)(2). When plaintiff's motion for a continuance was denied, he merely declined to proceed to trial. The court was confronted with the situation of a case on its calendar, awaiting trial, which plaintiff refused to try. The court consequently had no alternative but to grant defendant's motion, under Rule 41(b), for involuntary dismissal.

Even so, there is no indication in the *Gilbert* case that if plaintiff had even requested the court to specify, in its order of dismissal, that the dismissal was to be without prejudice, the court would have declined to do so. Neither the opinion in the case nor the record on appeal indicates any application by plaintiff that the court so specify; consequently, the dismissal took the ordinary course of a dismissal under subdivision (b) of the Rule, and operated as an adjudication upon the merits.

Respondent (p. 7) cites *Delahanty* v. *Newark Morning Ledger Co.*, 26 F. Supp. 327 (D. Ct., D. N. J. 1939), for the proposition that "under Rule 41 of the Rules of Civil Procedure, a plaintiff may no longer, as a matter of right, discontinue without prejudice once issue is joined."

The *Delahanty* case was a companion case to *Sauer* v. *Newhouse*, 26 F. Supp. 326 (D. Ct., D. N. J. 1939), in which the court handed down an opinion concurrently with its opinion in the *Delahanty* case.

Reading both opinions together, it becomes clear that the *Delahanty* case did not present merely a situation of discontinuance after issue joined. The two actions were representative minority stockholder suits, which actually proceeded to trial. During the progress of the trial, negotiations were held for the purpose of settlement. In the *Sauer* case, a settlement was agreed upon; notice was given to all stockholders, pursuant to Rule 23, to show cause why the settlement should not be confirmed; no intervenors appeared; the settlement was confirmed; and the suit was accordingly dismissed with prejudice. In the *Delahanty* case, the settlement efforts were unsuccessful, and plaintiffs moved for a dismissal without prejudice; the court declined to order a dismissal without prejudice, and proffered plaintiffs the alternatives of fixing a date for resumption of the trial or of accepting a dismissal with prejudice.

The *Delahanty* case is not authority for the proposition that a plaintiff may not "discontinue without prejudice

once issue is joined." It is authority only for the proposition that a plaintiff will not be granted the privilege of discontinuing without prejudice in the midst of trial. No such privilege was sought in the instant case.

American Nat. Bank & Trust Co. of Chicago v. *United States*, 142 F. 2d 571 (Ct. App., D. C. 1944), cited by respondent (p. 7), stands only for the proposition that an order entered under Rule 41(b), dismissing an action for lack of prosecution, is a dismissal with prejudice unless the court "otherwise specifies." The case does not purport to determine the circumstances under which a court should or should not "otherwise specify."

The question, arising in a second action, was as to the nature of the dismissal in the first action. The issue before the court was what type of dismissal had been entered—not what type of dismissal should be entered.

Respondent (pp. 5-6) cites *Landis* v. *North American Co.*, 299 U. S. 248 (1936), for the proposition that "It is not disputed that the granting of a continuance is a matter within the discretion of the trial court, which must necessarily be empowered to 'control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" Even apart from the fact that the "continuance question" is not presented on this application for a writ, the quotation has been taken out of its context. The question actually presented in the cited case was whether defendant's application for a stay should be granted in an action where the question of constitutionality of the statute involved was being litigated against the government in a series of forty-seven other actions pending in thirteen districts. The quoted words had nothing to do with the question of continuance, and of course nothing to do with Rule 41.

Respondent (pp. 6, 8) cites *Franklin* v. *South Carolina*, 218 U. S. 161 (1910), *Avery* v. *Alabama*, 308 U. S. 444

(1940), and *Seaboard Air Line Ry.* v. *Koennecke,* 239 U. S. 352 (1915), upon the "continuance question" and upon the applicability of the due process clause to the interpretation of Rule 41. The "continuance question" is not presented on this application for a writ, and the cited cases have nothing whatsoever to do with Rule 41.

Respondent (pp. 6-7) argues that if a continuance is properly denied, it necessarily follows that a dismissal without prejudice may not thereafter be granted. Respondent's argument is a *non sequitur.* The District Court could have permitted a voluntary nonsuit and, as a condition thereof, imposed appropriate terms. The imposition of terms, compliance wherewith would have been a condition precedent to the commencement of a second suit, would not have been tantamount to the granting of a continuance, because such terms would not only have penalized the plaintiff, but would also have compensated the defendant for any damages resulting from the voluntary dismissal—a situation which would not have existed if the continuance had been granted.

No non-obviatable prejudice has been asserted.

The whole essence of petitioner's argument to this Court is that, when a motion is made under Rule 41(a)(2) before the commencement of trial, a dismissal with prejudice is justified only in the presence of non-obviatable prejudice.

We cannot conceive how this question could have been presented more clearly than it was in petitioner's brief. Respondent knows that this is the question in the case, and nevertheless makes no effort in his brief to show any non-obviatable prejudice. That is a tacit admission that none existed. If none existed, the dismissal with prejudice was an error of law which this Court should correct.

As a matter of justice and equity, the error below should be corrected.

The injustice of the denial of petitioner's motion under Rule 41(a)(2) for a voluntary dismissal of his action without prejudice is further demonstrated by a study of the vesting order under which petitioner's stock was expropriated, and of the proceedings subsequent to such vesting order.

The total number of outstanding shares of the capital stock of General Dyestuff Corporation was 8,678; these shares were owned by eleven different persons (R. 53). All of these shares, including petitioner's, were vested in respondent by a single vesting order (R. 52-53). This vesting order sets forth the same ground for the vesting of all the stock. Suits were instituted by petitioner and other stockholders, seeking recovery of over 90% of the outstanding shares thus expropriated. All of the cases involved the same legal and factual issues.* In none of the cases was it made clear whether respondent contends that the stockholders were trustees for the asserted beneficial owner, or whether the interest of the asserted beneficial owner results from the existence at various times of options giving such asserted beneficial owner a right to purchase such shares upon the payment of $100 per share plus interest.

Since the dismissal with prejudice of petitioner's complaint in the instant case, *respondent has purchased their entire holdings from all of the other stockholders who had commenced suit for the recovery of their shares, and has paid them the sum of $118 per share, which represents the option price of $100 per share plus interest.* In other words, the stock of holders of 5,903 shares has

* "The instant case is but one of eight cases involving the same legal and factual issues now pending in the three different judicial districts." (Affidavit of James E. Markham, filed in *Bonnar* v. *Markham*, D. Ct., S. D. N. Y. 1944, Civil No. 24-462.)

now been purchased by the government, although the shares were vested by the same order, for the same reasons, and were the subject of the same causes of action, to which respondent interposed the same defenses. These facts show the merit of petitioner's claim.

Where other stockholders, whose claims were on a par with petitioner's, have been paid the option price plus interest for their stock in settlement of their suits commenced upon expropriation by the government, it is unconscionable that petitioner should be deprived of his property without compensation and without trial because of an asserted lack of diligence in preparing for trial. The judgment below unjustly enriches the respondent.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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